(6)

Supreme Court, U.S.
FILED
APR 29 2003
OFFICE OF THE CLERK

No. 02-39

IN THE

Supreme Court of the United States

Micrel, Inc.,
Petitioner,

v.

Linear Technology Corp.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Robert B. Morrill
(Counsel of Record)
SIDLEY AUSTIN BROWN & WOOD, LLP
555 California St.
Suite 5000
San Francisco, CA 94104
(415) 772-1200

April 29, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

17 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF FOR THE PETITIONER 1
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Bonito Boats v. *Thunder Craft Boats*, 489 U.S. 141 (1989).....10
CTS Corp. v. *Piher Int'l Corp.*, 527 F.2d 95 (CA7 1975).....4
Elizabeth v. *American Nicholson Pavement Co.*, 97 U.S. 126 (1878) 4
Frantz Mfg. Co. v. *Phenix Mfg. Co.*, 457 F.2d 314 (CA7 1972).....4
Group One v. *Hallmark Cards*, 254 F.3d 1041 (CAFC 2001)..... passim
Intel Corp. v. *United States International Trade Commission*, 946 F.2d 821 (CAFC 1991).....7
Kenyeres v. *Ashcroft*, slip op. at 4 (App. No. 02-777) (Mar. 21, 2003) (Kennedy, J., in chambers).....3
Klocek v. *Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).....7
Kock v. *Quaker Oats Co.*, 681 F.2d 649 (CA9 1982).....5
Lacks Indus. v. *McKechnie Vehicle Components USA*, 322 F.3d 1335, 2003 U.S. App. LEXIS 4471 (CAFC 2003)..3, 5, 7
Metallizing Engineering Co. v. *Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516 (CA2 1946) 2, 4, 5
Minnesota Mining & Mfg. Co. v. *Chemque, Inc.*, 303 F.3d 1294 (CAFC 2002), *cert. dismissed*; No. 02-828 (Apr. 9, 2003).....9
MLMC, Ltd. v. *Airtouch Comms.*, 215 F. Supp. 2d 464 (D. Del. 2002).....9
Moba, B.V. v. *Diamond Automation*, No. 01-1063, 2003 U.S. App. LEXIS 6285 (CAFC Apr. 1, 2003) 6, 10
Pfaff v. *Wells Elecs.*, 525 U.S. 55 (1999) ..... passim
RCA Corp. v. *Data General Corp.*, 887 F.2d 1056 (CAFC 1989).....7
Red Cross Manufacturing Corp. v. *Toro Sales Co.*, 525 F.2d 1135 (CA7 1975).....8

UMC Electronics Co. v. *United States*, 816 F.2d 647 (CAFC 1987), *cert. denied*, 484 U.S. 1025 (1988) 7

Statutes

35 U.S.C. 102(b)..... passim

Other Authorities

RESTATEMENT (SECOND) OF CONTRACTS (1981) 9

Timothy Holbrook, *Liability for the "Threat of a Sale"*, 43 SANTA CLARA L. REV. 25 (forthcoming 2003).....2, 8

SUPPLEMENTAL BRIEF FOR THE PETITIONER

An inventor is not entitled to a patent to the extent "the invention was * * * on sale in this country[] more than one year prior to the date of the application for patent." 35 U.S.C. 102(b). In this case, more than a year before filing its patent application, respondent engaged in not merely the "commercial marketing of [its] invention" (*Pfaff* v. *Wells Elecs.*, 525 U.S. 55, 67 (1999)) but a "blitzkrieg" of "extensive pre-release marketing activity designed to generate commercial interest" that caused numerous customers to submit purchase orders (Pet. App. 3a, 4a). Applying that court's "new legal standard" (*id.* 2a), which "changed the analysis" under Section 102(b) (*id.*), the Federal Circuit nonetheless held the patent valid because respondent made no formal "offer for sale, one which the other party could make into a binding contract by simple acceptance" (*id.* 11a (quoting *Group One* v. *Hallmark Cards*, 254 F.3d 1041, 1048 (CAFC 2001)). The petition demonstrated that certiorari should be granted because this new legal standard conflicts with this Court's precedents and the statutory text and purpose; because the question presented affects the validity of many thousands of patents; and because this case is potentially the only vehicle to decide the question presented, given that district courts will not make factual findings regarding the commercialization of inventions under the Federal Circuit's new legal standard.

The Solicitor General has narrowly opined that the question presented is insufficiently important to warrant certiorari because, in the government's view, the Federal Circuit's construction of Section 102(b) "does not appear to have resulted in a *dramatic* change" or "*radical* shift in approach" (Br. 10, 16 (emphases added)), and because "petitioner's concern that the Federal Circuit's current approach to the on-sale bar might improperly extend the duration of patents appears *overstated*" (*id.* 18 (emphasis added)). Study of the Solicitor General's brief reveals, however, that the government affirmatively rejects most of respondent's arguments for denying certiorari, while simultaneously offering substantial support for petitioner's principal contentions. The government apparently agrees that the Federal Circuit's decision not only rests on a profound

misreading of dictum in *Pfaff*, *supra*, but also misinterprets the on sale bar and conflicts with this Court's precedents. It both interposes an extra-statutory requirement and also runs contrary to the settled rule that the on sale bar arises from a patentee's efforts to "exploit his discovery competitively." *Pfaff*, 525 U.S. at 68 (quoting *Metallizing Engineering Co.* v. *Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516, 520 (CA2 1946) (L. Hand, J.)). Either trigger for the on sale bar supported by prior precedent – the inventor's (i) issuance of an "invitation to make offers," or (ii) subsequent receipt of offers from customers – provides a clear test that is more faithful to the statute's text and purpose and requires reversal.

For those reasons, and because the Solicitor General's brief furthermore understates the importance of the change in the law wrought by the Federal Circuit, certiorari should be granted.[1]

1. The petition demonstrated that the Federal Circuit in *Group One* seriously erred in reading *Pfaff* to require rejection of the "commercial marketing" standard. "*Group One* seems to continue a recent trend in Federal Circuit jurisprudence of relying upon ambiguous language in Supreme Court opinions to create binding, new precedent, regardless of the context of the language in the Supreme Court's decision." Timothy Holbrook, *Liability for the "Threat of a Sale"*, 43 SANTA CLARA L. REV. 25 (forthcoming 2003). Recognizing that the court of appeals acted "in response to this Court's *Pfaff* decision" (SG Br. 9), the government explains that *Pfaff* merely "considered whether an invention had to be reduced to practice to trigger the on-sale bar" (*id.* 7), not whether "commercial marketing" or instead a "formal contract offer" triggers Section 102(b). *Pfaff* did not use the phrase "*commercial* offer" to obliquely "suggest[] that the offer must meet the level of an offer for sale in the contract sense," as the *Group One* panel supposed (254 F.3d at 1047). To the contrary, as the panel in this case recognized, "[t]he facts of *Pfaff* * * * did *not* require the Court to decide what constitutes

---

[1] Here, as in many cases (see App., *infra*), the principal value of the Solicitor General's submission is thus the context it provides and the government's view of the merits, rather than its ultimate recommendation.

an offer for sale in the absence of an actual sale." Pet. App. 10a (emphasis added). Yet another Federal Circuit panel recently concurred: "The Court in *Pfaff* did *not* * * * expound upon [the] requirement of a 'commercial offer for sale,' as that was *not* an issue in the case." *Lacks Indus.* v. *McKechnie Vehicle Components USA*, 322 F.3d 1335, 2003 U.S. App. LEXIS 4471, at *31 (2003) (emphases added). Cf. *Kenyeres* v. *Ashcroft*, slip op. at 4 (App. No. 02-777) (Mar. 21, 2003) (Kennedy, J., in chambers) (recognizing as factor supporting certiorari that circuit has adhered to its view despite "internal criticism").[2]

Pfaff furthermore indicates that commercial marketing triggers the on sale bar.[3] The Court introduced its opinion by

---

[2] This Court instead employed the term "commercial" in *Pfaff* to distinguish *experimental* offers. See Pet. 20 (citing *Pfaff*, 525 U.S. at 67 ("[T]here is no question that the sale was commercial rather than experimental in character."). "Recognizing that an inventor must sometimes test an invention 'in the public eye' to 'perfect his discovery,' this Court has long omitted from the on-sale bar any sales that are for experimental purposes." SG Br. 7 (citing *Pfaff*, 525 U.S. at 64-65). The commercial versus experimental distinction in *Pfaff* thus arose from the Solicitor General's own brief in that case. See, *e.g.*, SG *Pfaff* Br. i (framing the Question Presented as: "Whether a patent is valid if the invention disclosed in the patent had been offered for sale *for commercial purposes*, but had not been 'reduced to practice,' more than one year before the date of the patent application." (emphasis added)); *id.* 28.

[3] The Court at oral argument was advised by both the government and the respondent that settled law regarded advertising activities, such as in this case, as an "offer" sufficient to put an invention "on sale." The following exchange occurred with counsel to the respondent:

> QUESTION: May I ask another question about the on sale portion of it? Leave aside the question of when the trigger goes off. On sale, we've established, can mean a contract. Suppose it's just that the inventor says to the world, I've got this thing, *commercially advertises it for sale*, would that satisfy the on sale requirement?
>
> Mr. BAIN: The current jurisprudence certainly says yes. If you're offering for sale, then it is on sale.

Pfaff Oral Arg. Trans. at 27 (emphasis added). The following exchange occurred with counsel to the government (*id.* at 39):

> QUESTION: Before you get to invention, what do you mean by on sale? Do you mean the same thing --

stating that it had "granted certiorari to determine whether the commercial *marketing* of a newly invented product may mark the beginning of the 1-year period even though the invention has not yet been reduced to practice." 525 U.S. at 57 (emphasis added). *Pfaff* furthermore quoted favorably with emphasis the Court's prior holding in *Elizabeth* v. *American Nicholson Pavement Co.*, 97 U.S. 126, 137 (1878), that "'*[a]ny attempt to use [the invention] for a profit, and not by way of experiment, for a longer period than two years before the application, would deprive the inventor of his right to a patent*'" (*quoted at* 525 U.S. at 65), as well as Learned Hand's formulation that the on sale bar is triggered by a patentee's efforts to "exploit his discovery competitively" (*Metallizing Engineering Co.*, 153 F.2d at 520, *quoted at* 525 U.S. at 68). The Court's opinion thus tracked the Solicitor General's brief, which cited the same language from Learned Hand to argue that "[t]he foremost purpose of the on-sale bar is to prevent[] inventors from exploiting the commercial value of their inventions while deferring the beginning of the statutory term." SG *Pfaff* Br. 18.

Disagreeing markedly with respondent, the Solicitor General reiterates that same statutory purpose in his brief in this case. "As this Court explained in *Pfaff*, Section 102(b) 'serves as *a limiting provision*, both excluding ideas that are in the public domain from patent protection and confining the duration of the monopoly to the statutory term." SG Br. 6-7 (quoting 525 U.S. at 64 (citing, in turn, *Frantz Mfg. Co.* v. *Phenix Mfg. Co.*, 457 F.2d 314, 320 (CA7 1972)) (emphasis added). See also *CTS Corp.* v. *Piher Int'l Corp.*, 527 F.2d 95, 102 (CA7 1975) (Stevens, J.). Accordingly, "once an invention is ready for patenting, the inventor 'must content himself with either *secrecy* or legal monopoly.'" SG Br. 7 (quoting *Metallizing Engineering Co.*, 153 F.2d at 520) (emphasis added). The Solicitor General

---

MR. MINEAR: It means it has been --

QUESTION: -- as Mr. Bain means?

MR. MINEAR: *It has been offered for sale, or has been advertised in such a way that the inventor would accept offers to buy.*

Id. at 39 (emphasis added).

makes a similar point in explaining that "Section 102 of the Patent Act sets out conditions on the issuance of a patent that are designed to ensure that the invention identified in the patent application is *sufficiently novel* to justify the award." *Id.* 6 (emphasis added). In particular, "Section 102(b)'s 'on-sale' bar prevents an inventor who has placed his invention *in commerce* from obtaining a patent unless the inventor applies for a patent within one year after placing it 'on sale.'" *Id.* (emphasis added).

The Federal Circuit's new test runs directly contrary to the purpose of Section 102(b) by permitting inventors to gain commercial advantage by placing their inventions in commerce through advertising, building market interest without triggering the obligation to secure a patent. The further fact that, under the Federal Circuit's new standard, "whether the distribution of samples, advertising, or trade show activities place an invention 'on sale' *may well vary from industry to industry*" (SG Br. 15 (emphasis added)) with respect to whether those activities "rise to an offer for sale under the UCC" (*Lacks*, 2003 U.S. App. LEXIS 4471, at *33) – notwithstanding that they *uniformly* commercialize the invention – further demonstrates the Federal Circuit's departure from the statute's text and purposes and the failure of the new rule to produce clarity and certainty. "While such niceties of offer and acceptance have a purpose in the context of contract formation – allowing different parties to cede or maintain control over final contract formation – *they make no sense as applied to whether something is 'on sale' in the patent context.*" *Amicus* Br. 12 (emphasis added).

The Solicitor General also disagrees with respondent's claim (BIO 13-17) that the "formal offer" rule is necessary to identify with certainty the onset of the on sale bar. Not only is that not the purpose of the statute (see *supra*), which accommodates any uncertainty through the "one year grace period" (*Kock* v. *Quaker Oats Co.*, 681 F.2d 649, 652 (CA9 1982) (Kennedy, J.)), but this Court simply "recognized in *Pfaff* that there are virtues in granting the inventor some ability to 'understand and control the timing of the *first commercial marketing* of his invention'" (SG Br. 17 (quoting 525 U.S. at 67)). Inventors control their advertising, and are furthermore

aware when, in response to those marketing efforts, customers submit offers to buy. Cf. Br. for the U.S., No. 02-575, *Nike* v. *Kasky* (explaining that initiation of marketing activities triggers state and federal advertising and unfair competition regulation). Furthermore, "where previously the indicators of an invention being on sale were often public and visible to competitors, under the new rule most public promotional activity is now irrelevant and competitors will remain in the dark as to whether a formal offer or sale has occurred. Regardless whether the Federal Circuit's new rule increases certainty for inventors, as it purports to do, it undoubtedly increases *uncertainty* for all others in the market seeking to use or compete with a commercialized invention." *Amicus* Br. 8-9.

But in any event, the fact that this Court has not yet determined the meaning of the "commercial marketing" prong in the entire time since Congress first enacted the on sale bar in 1836 is ultimately a substantial reason for this Court to grant certiorari, thereby completing the work it started in *Pfaff*.

3. "Unlike regional circuits, [the Federal Circuit] cannot rely on circuit splits to identify an issue for Supreme Court correction." *Moba, B.V.* v. *Diamond Automation*, No. 01-1063, 2003 U.S. App. LEXIS 6285, at *52 (CAFC Apr. 1, 2003) (Rader, J., concurring). This Court has accordingly treated the fact that "other courts have held or assumed" to the contrary of the Federal Circuit's rule as a further ground supporting certiorari. *Pfaff*, 525 U.S. at 60. Although the Solicitor General contends that the Federal Circuit's new legal standard "does not appear to have resulted in a *dramatic* change" or "*radical* shift in approach" (Br. 10, 16 (emphases added)), review is warranted because the Federal Circuit has overturned the long-standing rule that, although "a definite offer to sell is an essential requirement of the on-sale bar," "the requirement of a *definite* offer excludes merely indefinite or nebulous discussion about a possible sale" (*RCA Corp.* v. *Data General Corp.*, 887 F.2d 1056, 1062 (CAFC 1989) (emphasis in original)).[4]

---

[4] To be sure, the facts of the *RCA* case involved a formal contract offer. SG Br. 12. Yet the panel in this case correctly recognized that

Although the Solicitor General asserts that the difference between the "commercial marketing" and "formal offer" standards "does not manifest a substantial difference, in practice" (Br. 11), respondent quite correctly admitted that "[t]he difference between these two standards *is critical*" (BIO 16 (emphasis added)). There is obviously a substantial contrast between a test that holds that the on sale bar is triggered by advertising that amounts to a solicitation of offers (or at the least by the resulting receipt of offers from customers) and one that limits the bar to formal contract offers. In most modern commerce, "the purchaser is the offeror, and the vendor is the offeree." *Klocek* v. *Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000). The Federal Circuit's new standard accordingly will generally defer the start of the on sale bar until the date on which the inventor actually accepts the offers submitted by its customers, despite the fact that the inventor's advertising allows it to commercialize the invention in the meantime.

Respondent candidly acknowledged that several circuits held that "any 'activity by the inventor or his company in attempting to sell the patented idea' was said to place the product on sale," a "test" adopted by "[o]ther circuits, most

---

RCA, reflecting prior precedent, "*held* that commercial activity not rising to the level of a formal offer for sale could trigger the on-sale bar." Pet. App. 7a (emphasis added). As another Federal Circuit panel confirmed, that court "rejected the *RCA* non-contract approach in *Group One*." *Lacks Indus.*, 2003 U.S. App. LEXIS 4471, at *33. The single "example" offered by the Solicitor General as supposedly requiring a formal offer prior to *Group One* is inapposite because, in that case, there was no dispute that the inventor made a formal contract offer. *UMC Electronics Co.* v. *United States*, 816 F.2d 647, 657 (CAFC 1987) ("UMC offers only the purely technical objection that no complete embodiment of the invention existed at the time of the sale"), *cert. denied*, 484 U.S. 1025 (1988). Nor is the Solicitor General correct (Br. 9) that the Federal Circuit held, prior to *Group One*, that "in the absence of a definite offer [in the contract sense], the on-sale bar was not triggered." The single case the government cites, *Intel Corp.* v. *United States International Trade Commission*, 946 F.2d 821 (CAFC 1991), is inapposite because (as the Solicitor General acknowledges), the patentee did not distribute marketing materials to putative *customers* but rather merely "distributed samples of the invention *to its sales force*" (SG Br. 9 (emphasis added)).

notably the Seventh Circuit" but also "[t]he Ninth Circuit" and "[a] leading District Court case." BIO 21. The Solicitor General points out that the coherent, well-established line of authority acknowledged by respondent "involve[s] solicitations of potential customers that include samples or product demonstration and other sales-related material." SG Br. 13. But that perfectly describes this case, in which "the pre-critical date communications * * * included respondent's advertising and provision of preliminary data sheets" (*id.* 5), which were "*a primary selling tool*; these sheets informed customers of LTC product specifications so that the customers could design LTC components into their own products" (Pet. App. 3a (emphasis added)). The evidence furthermore indicates that respondent prior to the critical date did, in fact, inform one of its customers of "the price, $5.25." *Id.* 5a n.1. Nor does the Solicitor General dispute that the regional circuits applied the *rule* that "actions which are found commercially to exploit an invention prior to the critical date require a finding of an 'on sale bar.'" *Red Cross Manufacturing Corp.* v. *Toro Sales Co.*, 525 F.2d 1135, 1140 (CA7 1975). These precedents are "concerned *not with the formal requisites* of the challenged activity, but with its *effects*." *Id.* (emphases added). Respondent and the Solicitor General are furthermore unable to identify *a single case* in which marketing activities were held not to trigger the on sale bar.

The Solicitor General finally detects a single ambiguity in current Federal Circuit law, contending that "it is presently unclear, under the *Group One* rationale, how the provision of samples and other sales-related information to potential customers would affect the 'commercial offer for sale' inquiry." SG Br. 14. There is, in fact, little if any uncertainty in light of the facts of this case. But in any event, any lack of clarity on even this limited point is a ground for granting certiorari, not denying it. All agree that the commercial marketing of an invention no longer triggers Section 102(b), for the bottom line under Federal Circuit law is that "'promotional activity not rising to the level of a contractual offer-for-sale' does not trigger the on-sale bar." *Id.* 5. "[T]he Federal Circuit has *strictly adhered* to this new standard in subsequent cases." Holbrook,

supra, at 25-26 (emphasis added). "Generally, price quotations are not offers, because a quotation leaves many terms necessary to a contract unexpressed, for example, time and place of delivery, terms of payment, and other matters usually agreed upon before closing a deal. * * * * Advertisements, catalogs, and other promotional materials are generally considered invitations to solicit offers or enter into a bargain, not offers themselves." *MLMC, Ltd.* v. *Airtouch Comms.*, 215 F. Supp. 2d 464, 477-78 (D. Del. 2002) (citing *Group One* and this case). A patentee thus will trigger the on sale bar by providing samples and price information, *only if* the offeree could respond "in such a way that would create a contract" because the terms of the offer "meet the Restatement definition of an offer, which is 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that *his assent to that bargain is invited and will conclude it.*'" *Minnesota Mining & Mfg. Co.* v. *Chemque, Inc.*, 303 F.3d 1294, 1308 (CAFC 2002) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (emphasis added)), *cert. dismissed*, No. 02-828 (Apr. 9, 2003), *cited in* SG Br. 14 n.9. The fact that patentees and litigants now face further uncertainty regarding whether particular contracting activities will be deemed to rise to the level of a formal offer (including because that test may vary *by industry* (see *supra* at 6)) enhances the need for this Court's prompt intervention.[5]

4. The Solicitor General finally suggests that petitioner's concern that the Federal Circuit's new "formal offer" standard invites inventors to defer pursuing patents "appears overstated," given the desire to secure investment capital, minimize litigation over patent "priority," and foster patent protection abroad. *Id.*

---

[5] Although the Solicitor General is correct that the Federal Circuit *in Group One* acknowledged that it may often be difficult "to ascertain whether a set of interactions between parties constitutes a commercial offer to sell" and the court declined to "offer rules or even binding guidance" in that regard (SG Br. 18), "[s]ubsequently, in *Linear Technology Corp. v. Micrel, Inc.*, [*i.e.*, this case] this court explained that promotional activity not rising to the level of a contractual offer for sale cannot trigger the on-sale bar after *Group One*" (*Minnesota Mining & Mfg. Co.* v. *Chemque, Inc.*, 303 F.3d at 1307).

17-18. Those considerations apply, however, to formative inventions that have obvious economic value and are the subject of substantial competitive pressure. Far more common are inventions, like those at issue here and in *Pfaff*, in which the inventor seeks to "test the market" before incurring the considerable trouble and expense of securing a patent. The Solicitor General notably does not contest that the Federal Circuit's new standard permits a party to explore and develop commercial interest in the invention without triggering the one-year grace period, a prospect that this case illustrates perfectly. The fact that inventors frequently do not promptly file for patents is furthermore obvious from the many hundreds of cases in which courts have confronted the on sale bar.

There is thus no dispute that Section 102(b) is an important feature of the "carefully crafted bargain that encourages both the creation and public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time." SG Br. 6 (quoting *Pfaff*, 525 U.S. at 63 (citing, in turn, *Bonito Boats* v. *Thunder Craft Boats*, 489 U.S. 141, 150-51 (1989))). As the Solicitor General emphasized in *Pfaff*, it would defeat Section 102(b)'s "primary" purpose to "allow[] an inventor to exploit the commercial value of the invention while deferring the beginning of the statutory term of the patent." SG *Pfaff* Br. 8. See also *id.* 10, 18, 19-20. In light of the "distinct institutional difference between the United States Court of Appeals for the Federal Circuit and the other twelve circuits," "[w]henever a Federal Circuit panel makes an error interpreting the patent code, every district court in the nation, and even every later Federal Circuit panel, is obliged to follow and perpetuate the error." *Moba, B.V.*, 2003 U.S. App. LEXIS 6285, at *37 (Rader, J., concurring). Given that the question presented implicates many of the approximately 1,000 patents sought *every business day*, it is manifestly important enough to warrant this Court's attention.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition and reply brief, certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Robert B. Morrill
(Counsel of Record)
SIDLEY AUSTIN BROWN & WOOD, LLP
555 California St.
Suite 5000
San Francisco, CA 94104
(415) 772-1200

April 29, 2003

SOLICITOR GENERAL'S RECOMMENDATIONS

Br. for U.S., No. 01-10864, *Hitt* v. *Kansas* (recommending hold and disposal in light of recommended grant in No. 02-6693, *Smalley* v. *United States*, *cert. denied*, 123 S. Ct. 870 (2003)), *cert denied*, 123 S. Ct. 962 (2003);

Br. for U.S., No. 01-1710, *Empire Blue Cross & Blue Shield* v. *Byrnes* (recommending grant), *cert. denied*, 123 S. Ct. 1015 (2003);

Br. for U.S., No. 01-950, *Hillside Dairy, Inc.* v. *Lyons* (recommending denial), *cert. granted*, 123 S. Ct. 818 (2003);

Br. for U.S., No. 01-188, *Pharm. Research & Mfrs. of Am.* v. *Concannon* (recommending denial), *cert. granted*, 122 S. Ct. 2657 (2002);

Br. for U.S., No. 00-6029, *Ragsdale* v. *Wolverine World Wide, Inc.* (recommending denial), *cert. granted*, 533 U.S. 928 (2001);

Br. for U.S., No. 00-1073, *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo* (recommending denial), *cert. granted*, 533 U.S. 927 (2001);

Br. for U.S., No. 00-952, *Wis. Dep't of Health & Family Servs.* v. *Blumer* (recommending denial), *cert. granted*, 533 U.S. 927 (2001);

Br. for U.S., No. 00-665, *Montemayor* v. *Corporate Health Ins.* (recommending denial), *cert. granted, vacated, and remanded*, 536 U.S. 935 (2002);

Br. for U.S., No. 00-289, *Yarnell* v. *Cuffley* (recommending grant), *cert. denied*, 532 U.S. 903 (2001);

Br. for U.S., No. 99-1996, *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l., Inc.* (recommending denial), *cert. granted*, 531 U.S. 1143 (2001);

Br. for U.S., No. 98-5804, *In Re Smith* (recommending grant), *cert. denied*, 526 U.S. 1157 (1999);

Br. for U.S., No. 98-1987, *Valdespino* v. *Alamo Heights Indep. Sch. Dist.* (recommending grant), *cert. denied*, 528 U.S. 1114 (2000);

Br. for U.S., No. 98-1747, *Perez* v. *Pasadena Indep. Sch. Dist.* (recommending grant), *cert. denied*, 528 U.S. 1114 (2000);

Br. for U.S., No. 98-512, *Davis* v. *Bush* (recommending grant), *cert. denied*, 526 U.S. 1003 (1999).